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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

BARNES-MANLEY WET WASH LAUNDRY COMPANY, AND L. H. BARNES, *Petitioners,*

vs.

THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Come now petitioners and pray for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment below.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code. The judgment herein was entered April 30, 1948 (R. 152), a petition for rehearing being denied June 29, 1948. (R. 168)

Statement.

In 1931 respondent insured the laundry against loss by fire of customers' goods under a new type of policy known as a Bailee's Customers' Policy, the premium of which was based on the laundry's gross receipts from time to time. The policy contained a promissory warranty requiring the laundry to report accurately to the insurance company the gross business done each month. (R. 67) It contained no

forfeiture clause for non-payment of premiums. (R. 65) A total loss occurred in 1947 and the insurance company commenced paying the losses, during which time it discovered the laundry had over a period of years understated its gross receipts. In spite of this the insurance company elected to pay the complete losses to the extent of $211,000. It then sued (*a*) for rescission of the contract (the insurance policy) and the return of the $211,000 (R. 44); (*b*) in the alternative, for damages in the amount of $130,000 for breach of the promissory warranty in the contract (R. 50); (*c*) in the alternative, for recovery of the unpaid premiums based on the larger amount of business actually done, the gross receipts of which the laundry had understated. (R. 55) The trial court (Judge BROADDUS) denied (*a*) the return of the losses paid, and denied (*b*) the claim for damages, but granted (*c*) the recovery of the additional premiums (R. 72). On appeal, the court below by a divided court reversed the trial court, the majority (Judges PHILLIPS and BRATTON) holding that if the laundry's reports of gross receipts had been true, the liability of the insurance company would have been 43% of $211,000. Hence it held the damage to the insurance company by reason of the fraud and deceit of the laundry company was 57% of $211,000. The court said: "It is a well known practice of insurance companies to fix a maximum limit on the risk they will carry in a particular location. Here the false and fraudulent reports did not go to the character of the risk but they went to the amount of the risk in the particular location." (R. 148)

Judge HUXMAN, dissenting, held there was not a scintilla of evidence to show the "well known" practice of reinsuring above a certain figure referred to by the majority and that the measure of damages for the breach of the

promissory warranty[1] was that presumably within the wrongdoer's contemplation at the time, namely the loss of the additional premiums which the trial court awarded. He also stated that "What appellant would have done is incompetent to establish the measure of damages." (R. 151) Hence he was for affirmance. (R. 151)

While the case was pending below, the laundry moved to dismiss the appeal on the ground respondent had appealed from the entire judgment, part of which (for the additional premiums) was in appellant's favor. The majority below overruled petitioner on the ground Rules 8 (a) (3) and 8 (e) (2) of the Rules of Civil Procedure authorized alternative claims for relief and this right was not limited to the trial court but persisted on appeal until final disposition of the case. (R. 150)

Questions Presented.

1. On these facts, where the understatement of the gross receipts did not go to the *character of the risk,* and the insurance contract was a continuous one, with no forfeiture clause for non-payment of premiums, was the insurance company entitled to anything more than the recovery of the additional premiums?

2. Did the insurance company waive its right of action for the fraud or breach of contract by voluntarily continuing to pay claims, after it had acquired knowledge of the fraud?

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1. Although the jury found against petitioners on the single question presented to them, i. e., fraudulent understatement of gross receipts (R. 124), petitioners are not in the position of self-confessed wrongdoers. Petitioners failed to report 24 per cent to 28 per cent of gross receipts attributable to wholesale work for other laundries thinking that since the other laundries were insured on these articles, they were not covered by respondent's policy. Petitioners took the same view as to receipts for out-of-town work in Bartlesville and elsewhere. (R. 106-109)

3. Could the court below decree a *partial rescission* of the insurance contract?

4. Can the decision below properly turn on *what the insurance company says it would have done,* if the gross receipts had been accurately reported; and is there any evidence of practice, custom or usage made known to the laundry company, showing that the insurance company would have reinsured or cancelled the policy if the gross receipts had been accurately reported?

5. Under the Rules of Civil Procedure, where no election as to alternative inconsistent causes of action was made at the tiral, can the winning party on one cause of action take a general appeal from a judgment in his favor and put in issue the alternative inconsistent causes of action on which relief was denied? Is he not precluded by failing to elect at the trial? Or, is not the judgment in his favor by the trial court an election in itself, where the winning party did not ask that judgment be stayed by the trial court until appeal could be made from the court's dismissal of his other inconsistent alternative causes of action?

Reasons for the Allowance of the Writ.

1. This is admittedly a *case of first impression* (R. 144-145); a case in which the rights of insurance companies and their patrons under this unusual form of insurance policy are so fixed as to create an abrupt departure from the established rules of law, of contracts, damages, and fraud. There can be no doubt that unless this Court shall construe this insurance policy and announce a definite rule, neither insurance companies nor their patrons under this "bailee's customers' policy" can be sure of the results in those cases where the insured fails to report accurately its gross receipts, whether because of fraud, negligence or

mistake, it being our contention that the rule of damages is the same in either case. The various circuits will undoubtedly have different views, as witness the divided court in this case. Eventually, therefore, the matter would reach this Court, in all probability, because of the difference of opinion of different circuits. *It is of vast interest, therefore, to both the insurance companies of the nation and to those who seek the benefits of such insurance as is involved in this case, that the matter be disposed of by a binding decision.* Such decision, regardless of its form and regardless of its effect otherwise, will so stabilize the law that it will eliminate much litigation and will enable all persons similarly involved to predict with accuracy the holdings of all inferior courts.

2. Akin to the above: Four judges have passed upon this case, Judge Broaddus and Judge Huxman taking the one view; Judge Phillips and Judge Bratton taking the other.

3. The statement of gross receipts being for the purpose of providing a mathematical basis for computing the premiums due, an understatement thereof is not fraud "material to the risk," *i. e.*, increasing the hazard. The decision of the court below that such fraud vitiates so much of the insurance as exceeds the estimated liability based on gross receipts reported is contrary to the overwhelming weight of authority. (See *Transcontinental Ins. Co.* v. *Minning*, 135 F. (2d) 479; *Davis Schofield Co.* v. *Agricultural Ins. Co.*, 145 Atl. 38; *Penn Mutual Life Ins. Co.* v. *Mechanics Bank*, 72 Fed. 413, 428; trial court's opinion below and cases cited.) (R. 42-43) The partial forfeiture herein decreed is in implied conflict with the Oklahoma law announced in *Friend* v. *Southern States Life Ins. Co.*, 160 Pac. 457, and contrary to the rule of *Erie Railroad Co.* v. *Tompkins*, 297 U. S. 438.

4. The decision below in failing to hold that breach of a promissory warranty is waived by payment after knowledge, is in conflict with general insurance law. (*Ambrosy* v. *Oklahoma Union Insurance Co.*, 171 Okl. 223, 42 P. (2d) 849; *New York Life Ins. Co.* v. *Weaver's Adm'r.*, 70 S. W. 628 (Ky.); *Springfield Fire & Marine Ins. Co.* v. *Fine, et al.*, 216 Pac. 898 (Okl.); *German Ins. Co.* v. *Gibbs, Wilson Co.*, 92 S. W. 1068; *Gordon* v. *Continental Ins. Co.*, (Okl.) 76 P. (2d) 1055; *Muller* v. *Farmers Mutual Ins. Co.*, 196 N. W. 299; *Columbian Nat. Life Ins. Co.* v. *Rodgers*, 116 F. (2d) 705; *Home Ins. Co.* v. *Hightower*, 22 F. (2d) 882; *Nat. Ins. Co.* v. *Julian*, 150 So. 474.)

5. The decision below is in conflict with authority in decreeing a partial rescission. (*Stiegler* v. *Eureka Life Ins. Co.*, 127 Atl. 397; *Penn Mutual Life Ins. Co.* v. *Hartle*, 165 Md. 120, 166 Atl. 614; *Blackman* v. *Quennelle*, 66 So. 608; 37 Corpus Juris Secundum, Fraud, p. 352.) In particular it is in conflict with Oklahoma law. (*Wrightsman* v. *Brown*, 181 Okl. 142, 73 P. (2d) 121.)

6. The heart of the decision below is the emphasis placed on respondent's testimony that it placed a ceiling of $65,000 on petitioners' plant as the top risk (R. 148-149). The court said it was not concerned about the admissibility of evidence, excluded below, that the insurance company would have reinsured above this amount (R. 148). There was no evidence the insurance company told petitioners anything regarding its top risk figure. The court below admitted the understatement of gross business did not go to the character of the risk "but to the amount of the risk in the particular location." Its rule-of-thumb decision that it would permit losses to be paid in proportion to the gross business actually reported has a kind of spurious practicability but there is no warrant of law for it. As the dissent-

ing opinion points out, there is not a scintilla of evidence as to the custom, practice and usage on which the court pins its rule-of-thumb decision.

7. Plaintiff sued on three alternative inconsistent causes of action. The first cause of action sought a total rescission of the contract; the second cause of action purported to be an action for damages for breach of contract, but actually it amounted to a petition for reformation or partial rescission of the contract on the theory that the contract was vitiated by fraud as in the first cause of action; the third cause of action was for the balance of premiums due, recognizing the validity of the contract, then seeking a recovery of the premiums. No election was made, except that the court advised plaintiff that he could recover only on his third cause of action, and rendered judgment accordingly, thus making an election for him. Nevertheless, the plaintiff appealed from a judgment in his favor based upon his third cause of action. It is important that the Rules of Civil Procedure be construed by this Court, so as to determine for all time whether there is ever any election required. This Court is earnestly requested to decide whether it was the duty of the plaintiff in the trial court to dismiss his third cause of action when the court announced that relief would be granted upon it; or, in the alternative, to request the court to reserve ruling upon that third cause of action until it had appealed on the other two.

The confusion to result lies in the probability that in this case the trial court may still be confronted with more than one cause of action in spite of the Circuit Court's decision. Moreover, it is believed that the rules contemplate that at some time and under some circumstances, an election between alternative inconsistent causes of action is inevitable

and essential. That time, it would seem, is when the court itself makes an election for the pleader.

8. The plaintiff's own evidence, taken in its most favorable aspects, is such that the trial court could not have granted the damages referred to under any theory whatsoever as reasonable and proximate damages from fraud or the breach of promissory warranty. If the entire gross business had been accurately reported, under the undisputed evidence there would have been only approximately $90,000 worth of customer's goods covered in the contemplation of the insurance company. The additional $119,000 paid out in claims would not have been anticipated by them, even if there had been no fraud and even if there had been no breach of promissory warranty.

It is evident from the foregoing that there was a general bewilderment as to objectives in the court below. The case shows a "totality of errors" within the meaning of Rule 33(b) of this Court's rules—a clear departure from the "accepted and usual course of judicial proceedings."

These matters are covered more fully by brief, next attached.

Conclusion.

For the reasons above stated, petitioners pray that the writ should be granted and the judgment below reversed.

Respectfully submitted,

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SUPPORTING BRIEF UPON PETITION FOR WRIT OF CERTIORARI.

I.

The court has misconstrued the evidence in this case, and based its decision upon such misconstruction.

Damages can be recovered *only* on the basis of proven facts; damages cannot be recovered on the basis of what the insurer says it would have done if it had known the true situation. To allow damages on this basis is to give damages grounded on mere conjecture and speculation. As stated by the Oklahoma court in *Holcombe & Hoke Mfg. Co.* v. *Jones,* 228 Pac. 968, at 972, "mere guesswork, conjecture, and anticipation can never take the place of tangible facts upon which the jury may determine the actual damages sustained." In that case the court went on to say:

> "Even though upon a new trial there should be proven representations constituting actionable fraud, there must be made proof of damages consistent with the foregoing rule * * *. The possible profits which the defendant might have made from the operation of this machine cannot be considered as the basis of defendant's loss on account of fraud in the inducement of the contract. The case of *Bokoshe Smokeless Coal Co.* v. *Bray,* 55 Okl. 446, 155 P. 226, established the rule that ordinary 'anticipated profits of a commerical or other like business are too remote, speculative and dependent upon uncertainties and changing circumstances to warrant a judgment for their loss.' * * * No matter how fraudulent the conduct of the defendant may have been, if it occasioned no loss or damage to the plaintiff, he can recover nothing as damages. Since the defendant (plaintiff) produced no facts upon which the damages could be measured by any proper rule in an

> action to recover for fraud in the inducement of a contract, he has wholly failed to establish either a defense or a cause of action on the theory of affirmance and claim for damages for fraud."

Therefore, even if the insured had not by its own acts waived and condoned the fraud, it could not recover damages therefor based on its statements as to what it *would* have done.

The basis for allowing damages in this case is based on mere guesswork and conjecture. To demonstrate this: The insurer's witness, Charles Welk, testified that he was chief underwriter in the Inland Marine Department and had been in the insurance business since 1917 (R. 101). And that he has a "formula," based on gross receipts, by which they could tell when their liability or vulnerability became approximately $65,000. "The reports of Barnes-Manley Wet Wash before December, 1945, did not advise * * * (the insurer) * * * that the liability exceeded $65,000, and as a matter of fact, indicated considerably less. These gross receipts indicated approximately that the liability was something in the neighborhood of $40,000 and that he, as underwriter, had no facts or data that would indicate that the Company's loss would have approximated $65,000. That if Barnes-Manley had reported its correct gross receipts, he, as an underwriter, could have approximated, with a reasonable degree of accuracy, the total loss in the event of total destruction of the plant, *and as a matter of fact the information given them in the form of gross receipts, indicated only, in the event of total destruction, loss in the sum of $40,000.*"

Mr. Schweppe, another of the insurer's witnesses (R. 99), *testified that the top limit, according to the gross receipts that were certified to them by the Barnes-Manley*

Company, was under $40,000. He further testified that (R. 100) the $40,000 estimate could not be wrong, because they had had 19 years of experience, and had had many laundries burn in that time; that they could be mistaken within 10% or maybe within 15%, but no more.

The foregoing is the absolute foundation on which damages have been allowed in this case. If the foregoing is mere speculation, conjecture or guesswork, then there is *no* foundation for allowing damages in this case.

Let us examine the foregoing and see if it is reliable.

Mr. Welk said that he had a "formula" which told him that the reports of the Barnes-Manley Wet Wash before December, 1945, (they reported $131,205 for the period 1-1-45 to 10-30-45, from Plaintiff's Exhibit A, R. 139) indicated only, in the event of total destruction, loss in the sum of $40,000. According to Plaintiff's Exhibit A, (R. 139) the *actual* gross receipts for the Barnes-Manley Laundry Company for the period 1-1-45 to 10-30-45 were $209,869. Now let us see what plaintiff would have estimated its possible loss to be if the gross receipts for this period had been correctly reported:

Let X=possible loss if gross receipts had been correctly reported.

$131,205=receipts actually reported by Barnes-Manley.

40,000=estimated total liability based on reported receipts.

290,869=the receipts as they should have been reported, according to plaintiff's Exhibit A.

Then — $$\frac{\$131,205}{\$\ 40,000} = \frac{\$290,869}{X}$$

$$X = \$88,676.19$$

Therefore, on the basis of plaintiff's own testimony, if the Laundry Company had correctly reported its gross receipts, the insurer's total possible liability would have been estimated at $88,676.19.

The *actual* claims paid out by the insurance company amounted to $209,103.56. (R. 98)

Simple arithmetic doesn't misrepresent the facts. Surely the foregoing demonstrates the falsity of plaintiff's foundation of its claim for damages.

If the true gross receipts *had* been known, would the plaintiff have reinsured itself for everything over $65,000 (the top limit it said it had placed on this property, R. 99), *or* would it have reinsured itself in the amount of $23,676.19 ($88,676.19 minus $65,000), *or* would it have reinsured itself for anything at all?

How can a man possibly be required to pay out "damages" in the amount of $120,504.02 (the amount for which judgment was rendered in the lower court, R. 149) on the basis of such speculation, conjecture, and guesswork as is revealed above?

To illustrate the error into which the Circuit Court of Appeals was led, it is only necessary to quote the following language of that honorable court's opinion:

> "Here, the Insurance Company, through the fraud and deceit of the Laundry Company, was induced to assume and carry a risk which it did not intend or contemplate and which it would not have assumed and carried had true reports of gross receipts been made by the Laundry Company.[1] We are not concerned with the question of whether testimony was admissible to the effect that the Insurance Company would have reinsured the estimated risk when it rose above $65,000.

1. This is an assumption, not substantiated in the evidence.

It is a well-known practice of insurance companies to fix a maximum limit on the risk they will carry in a particular location. Here the false and fraudulent reports did not go to the character of the risk, but they went to the amount of the risk in the particular location. The undisputed facts show that the Insurance Company had fixed a top estimated risk of $65,000.[2] That was the extent of the estimated risk it was willing to assume and carry. Through the fraud and deceit of the Laundry Company, it was induced to carry a risk to the customers which aggregated $211,410.56. If the reports of gross receipts had been true, the liability of the Insurance Company would have been approximately 43 per cent of $211,410.56.[3] We think it must follow that the damage which it sustained as the result of the fraud and deceit of the Laundry Company was 57 per cent of $211,410.56." (Emphasis ours.)

Damages simply cannot be sustained on such a flimsy basis as has been allowed in this case. As has been demonstrated above, if the gross receipts *had* been correctly reported, the insurer's estimated risk would have been $88,676.19, according to its own "formula." When, *in fact,* the insurer paid out $209,103.56 in claims—a difference between its *estimate,* and its *actual* liability, of $120,427.37—a figure which approximates the damages assessed by the Circuit Court in this case.

This surely demonstrates the utter fallacy of allowing damages on such a speculative, conjectural basis as this. And the *only* damages that can be justified in this case, is the difference between the premiums paid by the Laundry Company and the premiums they should have paid.

The alleged fraud, therefore, under the actual evidence

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2. But this fact was not communicated to the insured.
3. This last statement just simply is not so, as has been demonstrated above.

made no substantial difference in the loss. It must be admitted, therefore, that the loss of the premiums is the only damage which could have accrued to the insured under their own testimony.

And it must be admitted that there is no basis or justification under the evidence for applying a pro rata rule in a proportion of 43 per cent to 57 per cent, unless at the same time we apply the other items of evidence as bearing upon the actual results of the alleged fraud.

In any event, it must be admitted that the evidence does not justify the conclusion reached by the Circuit Court.

As was stated by the Oklahoma court in *Holcomb & Hoke Mfg. Co.* v. *Jones, supra*: "No matter how fraudulent the conduct of the defendant may have been, if it occasioned no loss or damage to the plaintiff he can recover nothing as damages. Since the plaintiff produced no facts upon which the damages could be measured by any proper rule in an action to recover for fraud in the inducement of the contract, he has wholly failed to establish either a defense or a cause of action on the theory of affirmance and claim for damages for fraud."

The Circuit Court states (R. 148) that, "The false and fraudulent reports did not go to the character of the risk, but they went to the amount of the risk in the particular location." The authorities are all in accord that if the misrepresentation by the insured does not go to the character of the risk it is not material, and cannot be relied on by the insurer in an action for rescission, cancellation, forfeiture, or damages.

The court below has founded this decision upon a breach of a promissory warranty which is no more nor less than a breach of contract. Fraud is immaterial.

In *Hodgson* v. *Marine Ins. Co. of Alexandria,* 5 Cranch 100, 3 L. ed. 48, it was held that a misrepresentation, not averred to be material, is no bar to an action on a policy; a misrepresentation, to have that effect, must be material to the risk of the voyage.

In *Livingston and Gilchrist* v. *The Maryland Ins. Co.,* 6 Cranch 275, 3 L. ed. 222, it was held: The effect of a misrepresentation or concealment on a policy, depends upon its materiality to the risk, which must be decided by a jury under the direction of a court.

The court below said, "It is a well-known practice of insurance companies to fix a maximum risk they will carry in a particular location." There is no evidence of such a practice. We can only make this statement, but we defy counsel to find any such testimony in the record. If this is a matter of judicial knowledge, then by the plaintiff's allegations (binding upon it) we find this statement of the Circuit Court absolutely negatived. It may be sufficient to observe statements of counsel of plaintiff (R. 80 to 84): "This is a new policy. There have never been any decisions in the appellate court on this question. * * * Heretofore and before the development of this particular type of contract * * * they could only obtain insurance against their particular liability. * * * We say we have been deceived and defrauded, and therefore damaged to the extent of one-half of the total liability, as it actually was, *because that is what we would have reinsured.* That is the basis of our second cause of action. * * * On the 17th of July, 1945, and before the fire occurred December 19, 1945, we made an inspection and return of the methods of this particular plant for the purpose of determining this particular risk. At that time we made a check of the actual situation. We inspected their plant and took a report for these premiums to de-

termine whether to remain on the risk." Nor is there any evidence anywhere in the record that the insurance company ever at any time informed the laundry company that it had established a "top limit" of $65,000 on its liability on the insurance contract, or that it had established a top limit of liability of any other figure.

It must be clear, then, that we have a novel type of policy as to which there could be no well-established rule as to risks. Certainly the theory of the trial court, as set out at page 88 of the record, indicates that there could be no rescission for fraud, and that the measure of damages is the amount of premiums unpaid because, as the court said at page 89: "Williston on Contracts says that it is only the damage the parties contemplated at the time the contract was entered into * * * the breach thereof—whether fraud or otherwise."

II.

Damages Sought in a Breach of Contract Action Must Have Been Within Contemplation of the Parties.

This is an action on the contract, for breach of "promissory warranty," as opposed to a pure tort action for fraud. Therefore the damages to be collectible *must* have been within the contemplation of the parties.

This proposition is sustained by the statement of the lower court in this case (R. 146): "The provision of the policy by which the laundry company agreed to maintain and keep an accurate record of its business and on or before the 10th day of each month report to the insurance company the total amount of its gross receipts from business during the preceding month was a promissory warranty. That promissory warranty the laundry company breached, but it afforded no ground for the cancellation of

the policy because the insurance company affirmed the contract by continuing to pay loss claims after knowledge of the fraud."

The Oklahoma court in discussing this proposition in *Holcombe & Hoke Mfg. Co.* v. *Jones, supra,* stated: "Such action is based on a breach of an express warranty contained in the contract, and is not an action in tort for damages on account of fraud, but necessarily is an affirmance of the contract because it seeks to recover rights under the provisions of the contract. The action for damages for fraud is entirely distinct from any rights connected with a provision of the contract. 1 Page on Contracts, Sec. 340." The court then cited with approval the following: "An action for a breach of warranty is an action on the contract, whereas the gist of an action for fraud and deceit is not any breach of the contract but that the party has been led, to his damage, by fraud, into making it. *Thompson* v. *Libby,* 36 Minn. 287, 31 N. W. 52."

In this connection, this Court stated in *Globe Refining Co.* v. *Landa Cotton Oil Co.,* 190 U. S. 540, 47 L. ed. 1171:

> "* * * If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. * * *
>
> "The question arises, then, What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. * * * Mr. Justice WILLES answered this question, so far as it was in his power, in *British Columbia* v. *Nettleship*: '* * * I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. * * * If that (a liability for the full profits that might be made by machinery which

the defendant was transporting, if the plaintiff's trade should prove successful and without a rival) had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.'

"The only other allegation * * * is that the defendant maliciously caused the plaintiff to send the tanks a thousand miles, contemplating a breach of its contract. * * * The motive for the breach commonly is immaterial in an action on the contract."

In *D. M. Picton & Co.* v. *Eastes,* (C. C. A. 5) 160 F. (2d) 189, the court said:

"Damages for breach of contract, where notice of special damages is not given, are limited to those reasonably within the contemplation of parties, and liability will not be imposed for damages which could not have been reasonably foreseen as a result of a breach."

The following cases also deal with the question of foreseeable damages: *Gulf States Co.* v. *Loving,* (C. C. A. 4) 120 F. (2d) 195; *American Surety Co.* v. *Wheeling Co.,* (C. C. A. 4) 114 F. (2d) 237.

III.

Continuation of Performance of an Executory or Partly Executory Contract After the Discovery of Fraud, Waives the Fraud.

Where a contract is wholly or partly executory when the fraud is discovered, then if the defrauded party continues to perform under the contract, he thereby waives and condones the fraud, or breach of contract.

It was stated by the lower court:

> "While it is held in some jurisdictions that where a contract induced by fraud is still wholly executory on both sides at the time the fraud is discovered, the defrauded party may not affirm the contract and recover damages for the fraud and deceit, there would seem to be no logical reason for the application of that rule, where the basis of the action is not fraud which was an inducement to the contract, but fraudulent breach of a promissory warranty. Where, however, the contract has been partially executed, the great weight of authority supports the rule that the defrauded person may affirm and perform the contract and sue for and recover the damages suffered by reason of the fraud and deceit, *absent an intention on his part to waive the fraud.* Here, there had been a substantial performance of the contract by the Insurance Company when it first learned facts which caused it to suspect fraud and it had paid out approximately $90,000 in claims before it learned of the fraud." (Emphasis ours.)

The lower court is probably right in saying that where the contract has been partially executed the weight of authority supports the rule that the defrauded person may affirm and perform the contract and sue for and recover the damages suffered by reason of the fraud and deceit, absent an intention on his part to waive the fraud. How-

ever, in this case we think it can be amply shown that the insurance company by its actions fully justifies the inference that it intended to waive the fraud in this case and fully perform under this contract whether it had any legal liability to do so or not. In the trial court the insurance company's witness, Mr. Schweppe, testified (R. 100) that "they were paying claims promptly, but they became suspicious when it passed $40,000 and the audit was ordered. They wanted the audit to get more information so they did not stop paying claims right then, no matter what the loss was, they were going to pay the policy." On redirect examination he testified (R. 100) that "when the loss went to $90,000 he knew that the gross receipts had been incorrectly reported, and asked for an audit. That the policy runs not only to the customer, but to Barnes-Manley, and that the insurance company felt a moral obligation whether it was legally correct or not."

Too, this proposition is supported by the Oklahoma cases. In *Ambrosy* v. *Oklahoma Union Ins. Co.*, 171 Okl. 223, 42 P. (2d) 849, the court said:

> "The general rule that insurer may recover back a payment induced by fraud of insured in procuring policy is applicable to life insurance.
>
> "A voluntary payment under a life insurance policy made with knowledge of the facts cannot be recovered."

In that case the Oklahoma court also cited with approval *New York Life Ins. Co.* v. *Weaver's Adm'r.*, 70 S. W. 628, (Ky.) in which it was held that where an incontestable insurance policy was procured by fraud, and the company did not elect to rescind the same during the life of insured, and on her death, under an impression that it could not defend an action on the policy, paid the same, it was not en-

titled to maintain an action against assured's administrator for deceit to recover the amount of the policy paid and other damages. Another opinion in connection with this same case may be found in 77 S. W. 381.

In *Springfield Fire & Marine Ins. Co.* v. *Fine,* 216 Pac. 898, the Oklahoma court said:

> "It is next insisted that the acts of the adjuster which were not protected by the non-waiver agreement are not sufficient to constitute a waiver. The argument on this question is that waivers are either express or implied; that express waiver must be upon consideration and implied waiver results from conduct and acts which indicate an intention to relinquish a right held or by such failure to insist upon it that the party is estopped afterwards to set it up against his adversary; and it is further argued that, inasmuch as there is no express waiver claimed in this case, an implied waiver will result only from such conduct as would create an equitable estoppel. Defendant then cites numerous cases from this court in which the essential elements of equitable estoppel are set out. It is not necessary to review those cases, as in our opinion it is not necessary in order to create an implied waiver of provisions of an insurance policy for the conduct and acts to be sufficient to create equitable estoppel. • • •
>
> "In order to constitute a waiver, it is neither necessary that an agreement be supported by a new consideration nor that the facts should be such as to create an estoppel. In *Kiernan* v. *Duchess County Mut. Ins. Co.,* 150 N. Y. 190, 44 N. E. 698, it is said:
>
> > 'While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either; for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct

of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision of the policy. * * * While the principle may not be easily classified, it is well established that if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it is intended to 'abandon and not to insist upon the particular defense afterwards relied upon,' a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked."

* * * * * * * *

"While acts of the insurer constituting an equitable estoppel will amount to a waiver of the provisions of an insurance policy, yet a waiver may also result where the essentials of an equitable estoppel do not exist and where there is no new consideration supporting the same, if the facts are such as to show an intention to abandon or relinquish the right to forfeit the policy. According to the plaintiff's testimony, an adjustment of the loss was made, resulting in a final understanding and an agreement to pay the face of the policy. This has been held to constitute a waiver of all the breaches of conditions in the policy of which the insurer then knew or ought to have known. (Citing cases.)"

In *Gordon* v. *Continental Ins. Co.*, 76 P. (2d) 1055, the Oklahoma court said:

"A waiver may be expressed by any acts showing unequivocally the intention to continue the contract of insurance in force after knowledge of the breach of a condition. A participation in adjustment of the loss under a fire policy, amounting to a final understanding and an agreement to pay a sum thereunder to the insured, amounts to a waiver of all breaches of condition of which the insurer then knew or ought to have known, even though the adjustment is subsequently broken off or repudiated."

In *Atlas Assurance Co.* v. *Fairchild*, 43 P. (2d) 482, the Oklahoma court said:

"Where a fire insurance policy contains a clause that if the building insured is abandoned for school purposes for an indefinite period, without written permission hereof, then this policy shall be void, and thereafter the building is abandoned for school purposes and the insured, by its agent, notifies the agent of the insurance company, who issued the policy of insurance, that the building had been abandoned for school purposes, and the insurance company fails to cancel the policy or take any action whatever on the notice until after the building is destroyed by fire, that provision of the policy was thereby waived by the insurance company, and such insurance company cannot, after the loss has occurred, deny liability."

In *National Life Ins. Co.* v. *Clayton*, 173 Pac. 356, the Oklahoma court said:

"An insurance company may waive any provision in a policy intended for its benefit. Where there has been a breach of the conditions of a policy, the company may, at its election, take advantage of such breach and cancel the policy, or it may waive the forefeiture by acts as well as words.

"Any declaration or course of action on the part of an insurance company which treats a policy, which the company could declare forfeited because of a breach of the conditions of the policy, as a valid and subsisting policy, which declaration or course of action is relied upon and acted upon by the insured, will constitute a 'waiver' on the part of the insurance company of its right to forfeit such policy because of such breach of the conditions thereof."

In *Sovereign Camp, W. O. W.*, v. *Pettigrew, et al.*, 224 Pac. 545, the Oklahoma court said:

"The recognition of the continued validity of a

certificate or policy, with knowledge of facts entailing a forfeiture, is a waiver of the forfeiture as a matter of law, and it is not necessary that there be a new agreement or the elements of an estoppel."

The Oklahoma court in *Holcomb & Hoke Mfg. Co.* v. *Jones,* 228 Pac. 968, said:

"Any act of a defrauded party which recognizes the binding force of a contract, the execution of which was induced by fraud of the other party, constitutes an affirmance of the contract, and waives the right of rescission on account of fraud, but does not necessarily waive the right to recover damages for fraud.

"The rule that affirmance of a contract, with knowledge of fraud, does not bar an action for damages, is subject to the limitation that the defrauded party, after discovering the fraud, must stand toward the other party at arm's length and must not make any new agreements or engagements respecting it. If he does so, he condones and waives the fraud.

"When a party, by fraud, has been induced to enter into a contract, and said contract remains wholly executory when such defrauded party discovers the fraud, a part performance of same thereafter by the defrauded party waives and condones the fraud, and this the court will determine upon admitted facts as a matter of law. But when such contract has already been partly or wholly executed by the defrauded party before his discovery of the fraud, it is a question of fact to be determined by the jury, under proper instructions, whether the acts of the defrauded party thereafter done amount to a waiver or condonation of the fraud. However, where the acts of the defrauded party after the discovery of the fraud in relation to a contract already partly executed are such that the minds of all reasonable men must agree as to his intentions, the determination of that question may be made by the court."

The Oklahoma court in that case also cited with approval the case of *Kingman & Co.* v. *Stoddard,* 85 Fed. 740, in which case the contract was partly executed when the defrauded party discovered the fraud. He nevertheless continued to perform under the contract with full knowledge of the fraud, and the court held that by so doing he had waived and condoned the fraud, and had no cause of action for damages because of the deceit.

In *Cash* v. *Thomas,* 161 Pac. 220, the Oklahoma court said:

> "Where one, who has been induced to enter into a contract by fraud, after discovery of the fraud, with full knowledge of the facts and of his own right to impeach the contract for fraud, or who ought to, or might, with due diligence, have been aware of such right, proceeds to the execution of the contract and receives and retains the consideration therefor, he thereby ratifies the contract and cannot thereafter set up the alleged fraud as ground for cancellation or rescission."

In *Simon* v. *Goodyear Metallic Rubber Shoe Co.,* 105 Fed. 573, the Circuit Court of Appeals for the 6th Circuit held that where a party who has contracted to sell and deliver a commodity in the future at a fixed price learns while the contract is still to a large extent executory that representations of fact made by the other party, which induced him to enter into the contract, were false, he has his election to repudiate the contract at once, and sue for the loss he has already incurred, or to go on with it; and, if he continues performance and completes his deliveries thereunder, he waives the deceit and affirms the contract, and cannot thereafter maintain an action for the deceit, even to the extent of recovering damages to the amount of the loss incurred before his knowledge that the contract was not obligatory. In that same case the court said:

"But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he has knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered."

In *Cochran* v. *United Order of Commercial Travelers*, 143 F. (2d) 82, the Circuit Court of Appeals for the Tenth Circuit said:

"* * * The courts will not make a new contract for the parties, but the provisions pertaining to forfeiture should be liberally construed in favor of the defaulting party and whether the principles of waiver or estoppel will operate to stay the hand of forfeiture depends upon the peculiar facts in each case. *Insurance Co.* v. *Norton*, 96 U. S. 234, 242, 24 L. ed. 689. It is a familiar rule of law that an insurance company may by its conduct waive its right to claim a forfeiture under a provision inserted in an insurance policy for its protection, and it is not necessary that the waiver be an expressed relinquishment of the known right, but it may be a legitimate deduction from the acts and conduct of the party."

In *New York Life Ins. Co.* v. *Eggleston*, 96 U. S. 573, 24 L. ed. 841, it was held that any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract.

If the course of action of the insurance company in this case had been the same course of action as is now pursued

in this lawsuit, the insurance company would have notified the insured that they had discovered the fraud and that they were paying out the claims of customers with the intent to recover them back from the insured. This it was their duty to do, and not to proceed in the payment of claims without notifying them that in effect they were paying the money of the insured and not the money of the insurer. Under the above theory, having so done they are now estopped to take any other position.

This doctrine combines itself with waiver, mitigation of damages, and proximate cause, to bring about the irresistible conclusion that the company cannot now assert that the damage here sustained is a damage recoverable in the manner and to the extent announced by the Circuit Court of Appeals.

In the instant case it must be deemed true that the trial court found that the fraud was waived if fraud was a material factor in the case, and as held in *Grand Trunk Co.* v. *Nelson Co.*, (C. C. A. 6) 116 F. 2d) 823, the "Circuit Court of Appeals is not permitted to pass on the weight of the evidence in determining the sufficiency of the evidence to sustain the judgment." Nor could the Circuit Court in the instant case determine from the evidence that there was no waiver of fraud. That was a question for the court below, or for a jury, as is held in all the cases.

Other cases dealing with this proposition are: *North River Ins. Co.* v. *O'Conner*, 164 Pac. 982 (Okl.); *Commercial Standard Ins. Co.* v. *Reamer*, 119 F. (2d) 66; *North British & Mercantile Ins. Co.* v. *Lucky Strike*, 207 Pac. 446 (Okl.); *Gish* v. *Insurance Co. of North America*, 87 Pac. 869 (Okl.); *Western Reciprocal Underwriters* v. *Coon*, 134 Pac. 22 (Okl.); *Continental Ins. Co.* v. *Hall*, 137 P. (2d) 908 (Okl.).

It is our contention that to allow a person who has discovered the fraud while the contract is still largely executory, to go on and execute it, and then sue for the fraud, looks very much like permitting him to speculate upon the fraud of the other party. It is virtually to allow a man to recover for self-inflicted injuries. The fraud is really consummated, and the damages incurred, by the continued paying of claims after the fraud is discovered. And if this is done after the fraud is discovered, the insurer cannot say that he sustained this damage by reason of the fraud. It seems to us that if a party discovers the fraud while the contract is still largely executory, he must decide whether he will go on under it, or rescind. He cannot say it is a good contract for the purpose of authorizing him to pay out claims to the patrons of the laundry, but not binding on him as between himself and the insured.

IV.

Contract Was, at Time of Discovery of Fraud, Wholly Executory as to Patrons Who Had Not Been Paid Their Loss.

If this is a third party beneficiary contract in favor of the laundry patrons as it was stated to be by the lower court (R. 145), then as to each individual laundry patron there was a separate and distinct contractual relationship, as opposed to there being an entire and indivisible contract between the Laundry Company and the insurer. Therefore as to those laundry patrons whose claims were unpaid when the insurer discovered the breach of the "promissory warranty" in this case, the contract was wholly executory and therefore comes within the majority rule announced in Proposition 3, *supra*.

V.

Insurance policy did not *ipso facto* give laundry patrons right of action against either insurer or insured without the establishment of negligence on part of the insured and hence claims paid by insurer were in all probability claims that insured would not have been held liable for.

Policy: "1. Loss, if any, at the option of this company to be adjusted with and paid to the assured for account of whom it may concern, *or* adjusted with and paid direct to its customers * * *." (R. 65)

This clause does *not* make the laundry patrons third party beneficiaries of this contract in the sense that *they* could have sued the insurer in their own right for payment of losses sustained by them. They are merely incidental beneficiaries under this contract, and the law is settled that a mere incidental beneficiary of a contract cannot sue thereon. This contract was entered into solely for the purpose of saving the Barnes-Manley Laundry Company free from liability in case of loss of customers' bundles. Therefore, since the customers could not have sued the insurer to recover their losses, they would have been limited to an action against the laundry company itself. Here too, the law is settled that a bailee of goods is not an insurer of those goods; he is liable for their loss *only* in case he is negligent. Therefore it is probable that the laundry company *could* have resisted payment of *all* $209,000 of these claims—and the insurer was in the nature of a volunteer, an extremely philanthropic payor of any and all claims presented, with little or no investigation as to their validity, and without the insured demanding that the same be paid. The insurer acted entirely upon its own, and apparently from gratuitous motives in paying this staggering sum of claims. It should NOT be allowed to penalize the

insured because of its own negligence and beneficence. To allow the insurer to recover this sum from the insured would be to allow the insurer to profit by its own negligence, carelessness, and gratuitous payment.

In *Krauss* v *Greenbarg*, (C. C. A. 3) 137 F. (2d) 569, at 572, the court said:

> "* * * One of the legal tests which must be met in order for something which is a cause in fact to be a 'legal cause' is that it shall have been a substantial factor in bringing about the harm. As thus used substantial denotes 'the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause' * * *."

The footnote at this point in the opinion is as follows:

> "2. Restatement, Torts (1934) Sec. 431, Comment a. This problem is the same in tort and contract, though liability for consequences of an act is often carried further in instances where the defendant's liability is based on a tortious act. See 15 Am. Jur., Damages (1938), Sec. 18; *Pennsylvania Railroad Company* v. *Aspell*, 1854, 23 Pa. 147, 151, 62 Am. Dec. 323."

This is closely allied to the question of the duty of a defrauded person to minimize his damages. In this case it was the duty of the insurer to cease payment upon becoming convinced, or even upon becoming suspicious of the alleged fraud or breach of promissory warranty.

The option in favor of the insurer to pay directly to the laundry customers surely did not give it the right to blindly pay out $209,000 to any and every claimant that presented his claim. If so, the insurer might just as well be claiming reimbursement for $1,000,000 paid out rather than $209,000. The difference is one of degree rather than substance. The questionable validity of the claims paid by the insurer is well illustrated by its own figures. According to the insurer

it had 3,500 claims (R. 100), and paid out $209,000 (R. 90), an *average* of $60 per claimant—an unreasonable figure when considered in the light of the *average* laundry patron, and the goods he might have had in the laundry.

VI.

No Trust Relation Present Between Laundry Patrons and Either Insurer or Insured.

Nor could the patrons of the laundry have prosecuted an action against either the laundry company or the insurer on any trust theory, some mention of which has been made by opposing counsel. It was *not* the intention of the parties to this contract to set up a trust in favor of the laundry patrons; there was no trust *res*, nor was there any trust motive. Nor were the "beneficiaries" definite and certain. Nor is there any ground for declaring a constructive or implied trust in favor of the laundry patrons.

On the whole, the insurer without any attempt to get a judicial declaration of its liability, and even without a demand on the part of the laundry company to pay these claims, blindly, carelessly, and negligently paid out $209,000, which according to the insurer's own theory of this case, could not have been enforced against it because of fraud. The insurer should not be allowed to profit by its own carelessness.

In *W. B. Moses & Sons* v. *Lockwood*, (Ct. App. D. C.) 295 Fed. 936, 941, the court said:

> "Damages which may be avoided by doing what an ordinarily prudent man would do are not the direct and natural consequences of defendant's wrong, since it is plaintiff's option to suffer them. In such a situation the plaintiff is damaged, not by the defendant's act, but his own negligence or indifference to consequences.

Chesapeake & Ohio Railway Co. v. *Kelly,* 241 U. S. 485, 489, 36 Sup. Ct. 630, 60 L. ed. 1117, L. R. A. 1917F, 367, and cases there cited."

In *Southwestern Packing Co.* v. *Cincinnati Co.,* (C. C. A. 5) 139 F. (2d) 201, the court said:

"* * * We will say that recoverable damages must be the direct and natural result of the deceit; and that the plaintiff was under duty to exercise diligence and prudence to end or minimize them. * * * "

In *American Surety Co.* v. *Franciscus,* (C. C. A. 8) 127 F. (2d) 810, at 815 the court said:

"The general rule for minimizing damages is 'that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.' *Warren* v. *Stoddart,* 105 U. S. 224, 229, 26 L. ed. 1117; *Cronan* v. *Stutsman,* 168 Mo. App. 46, 151 S. W. 166; 25 C. J. S., Damages, Sec. 34, p. 502. * * * "

In *Transit Bus Sales* v. *Kalamazoo Coaches,* 145 F. (2d) 804, at 807 the court said:

"This is but the application of the familiar rule requiring mitigation of damages after a breach, or as Professor Williston so succinctly puts it, 'a plaintiff cannot hold a defendant liable for damages which need not have occurred.' Williston, on Contracts, Sec. 1298."

VII.

The taking of a judgment in the trial court upon one of many inconsistent theories pleaded was an election of causes of action, and the party securing the judgment may not appeal from the judgment in his favor, and is estopped by his prior election from appealing on the other causes.

The fact that one obtains less money under one alternative theory than another is not the test in this case as to the rightfulness of the judgment.

In those cases where one appeals from a judgment in his favor but for less than the amount sued for or the amount that is claimed to be due, he appeals on the same theory without any inconsistent position being asserted than his own assertion that the judgment is too small under the evidence. That is not the case here. The plaintiff has sought and obtained every dollar he asked for under his third cause of action; has accepted the benefits of a judgment in his favor; has thereby himself conclusively elected to stand upon that cause of action. The authorities are universally to the effect that one cannot sue upon one theory and obtain a judgment, and then sue upon another theory. Yet that is what is being done here. The rules, as we interpret them, do not contemplate such a complete disruption of the long-established legal principles involved, by estoppel or otherwise, in the doctrine of election of remedies. What the rules mean, or should mean is this, and nothing more: A litigant may step into court and seek any number of conflicting remedies on inconsistent causes of action, arising out of the same facts. He may, as in the instant case charge: *First,* that the contract of insurance is void; *second,* that the contract of insurance should be reformed to fit the representations of the defendant; *third,* that the contract should be treated as valid and subsisting

in all of its particulars, and the plaintiff recover the additional premiums due.

Such a rule, we agree, tends to the promotion of justice, and brings about a facile administration of litigation. No one can quarrel with such a rule.

But the rule does not and cannot mean that the plaintiff, after all of the evidence is in, can request of the court conflicting instructions on the various theories of his case. He is then in a position (as much so as in the appellate court) to know what remedy of those he seeks is the correct remedy.

If, then, he submits a requested instruction to the court on the theory that the contract is void; and that the contract should be re-formed; and that the contract is valid but that the plaintiff is entitled to the premiums—the court is certainly not bound to consider any of his requests. Then, certainly, the plaintiff must elect which issue he desires submitted to the jury and stand upon it. Then, certainly, he can no longer take advantage of the benefits derived from the rules. He must elect, not because the rules do not give him the right to initiate inconsistent causes of action, but because at some time he must take a stand. A simple method would be as suggested before, to request an instruction to the jury upon that phase of the case which to him seems right, and if the court refuses it and seeks to submit the question bearing the lesser damages to the jury, then he should request the court to withhold such submission and permit him to appeal from the other decision, striking the more beneficial cause of action. Or, on the other hand, he might dismiss the less beneficial cause of action. There must be a time, as we shall point out later, when some definite theory of his case must be requested by him, and

he must stand upon it. The judgment in this case is an absolute estoppel as against both of the parties.

The court below in its opinion said (R. 150):

> "The Laundry Company has lodged a motion in this court to dismiss the appeal on the ground that the three causes of action pleaded in the amended complaint are inconsistent and that, having recovered on the third cause of action as to which no error was assigned, the Insurance Company cannot prosecute the appeal for the sole purpose of determining whether it should have recovered on another inconsistent cause of action. Rules 8(a) (3) and 8(e) (2) of the Rules of Civil Procedure authorized the Insurance Company to state as many separate claims as it has, regardless of consistency, and to seek relief in the alternative. The Insurance Company did recover on the third cause of action but that cause was pleaded in the alternative and the Insurance Company insisted throughout that it was entitled to recover a larger amount on either the first or second causes of action. The notice of appeal was from the entire judgment and it brought the judgment as a whole here for review. While it is the general rule that a party cannot appeal from a judgment in his favor, the rule is not absolute, and where a judgment gives the sucessful party only part of that which he seeks and denies him the balance, with the result that injustice has been done him, he may appeal from the entire judgment." (Citing cases.)

With this part of the court's opinion we have no quarrel. It is conceded that the Rules of Civil Procedure authorize a plaintiff to state as many separate claims as it has, regardless of consistency, and to seek relief in the alternative; and the cases clearly hold that plaintiff may not be required to elect on which claim he will proceed *before trial*. We also concede that a party may appeal from a judgment in his favor where that judgment gave him

only part of what he sought and denied him the balance. But that is not the case here. In this case, as far as respondent's third cause of action is concerned, he got everything to which he was entitled, in the trial court. Therefore, he may not appeal from that judgment in his favor. The cases cited by the Circuit Court in its opinion as sustaining the rule that a party may appeal from a judgment in his favor all deal with a case where plaintiff sought recovery in the trial court on one cause of action and secured a judgment for a less amount than he was entitled to. In none of those cases did the plaintiff go to trial on more than one cause of action and, obtaining a judgment on one of his causes of action, appeal therefrom. It is our contention, therefore, that the cases cited by the Circuit Court in support of its statement that a party may appeal from a judgment in his favor have no application to the question presented in this case.

The Circuit Court went on to say (R. 150):

> "Moreover, the right to plead inconsistent causes of action and to seek relief in the alternative given by the Rules of Civil Procedure is not limited to the trial in the District Courts. Such right with respect to controversial questions of law obtains until final disposition on appeal. The motion is without merit and is denied."

For this statement the court cited no authorities, and it is our contention that the authorities support a contrary rule.

In *Albert* v. *Martin Custom Made Tires Corp.*, 116 F. (2d) 962, a case decided in 1941 in the Circuit Court of Appeals for the Second Circuit, Judge LEARNED HAND, speaking for the court, said:

> "By the law of New York if the victim of a fraud presses an action through to successful judgment—

whether to rescind, or to recover on the promise, or for damages—he may not thereafter reverse his position. (Citing cases.) We need not here consider how far short of judgment he may safely go before he discontinues * * * because the petitioners never abandoned their claim that the mortgage was valid, but asserted it to the end. Moreover, the victim may commit himself irretrievably to the bargain in other ways than by bringing suit * * * and one way, if he is a defrauded seller, is to file a claim in insolvency for dividends due upon the price. (Citing cases.) * * * But the loss of the right to disaffirm is imposed upon the putative victim of the fraud regardless of his intent, and only because it is unfair to allow him to play fast and loose. If with his eyes open he chooses and does not even avail himself of his *locus penitentiae* by discontinuing, it is reasonable to deny him the privilege of changing his mind. True, the reason usually given for not holding him to his first choice when the right he has chosen proves illusory, is that he has really had no choice; and that reason does not exist here."

This decision by Judge HAND is significant in several respects: (*1*) The case was decided under the new Federal Rules of Civil Procedure; (*2*) it recognizes the fact that one must elect before judgment which of several inconsistent remedies he will pursue, and if he pursues one of several inconsistent remedies to judgment, he will be deemed to have made a final election to stand on that cause of action; (*3*) this decision would seem to indicate that although the Federal Rules allow a plaintiff to plead alternative inconsistent causes of action in one petition, the rule as to election of remedies is governed by the law of the state in which the action was begun.

In this connection the Oklahoma court, in *Lester* v. *Fields*, 43 P. (2d) 87, said: "The filing of a petition seeking two inconsistent remedies does not constitute an election

to pursue either of them * * *." And at page 88: "'Where plaintiff alleges two inconsistent causes of action in the same complaint, there is no election as to either, but at the time of trial plaintiff may be required to elect between them.' (Citing cases.)"

A very learned analysis of the question of inconsistency of remedies is found in *McMahan* v. *McMahan*, 115 S. E. 293 (S. C.). In this case the court said:

> "Upon the breach of the contract by Mrs. McMahan the plaintiff had open to him two remedies—an action to enforce the specific performance of the contract (the result being he would pay the purchase price of the lot and Mrs. McMahan would execute and deliver a deed to him), or an action against her for damages consequent upon the breach; the one in equity, the other at law. The remedies are not inconsistent with each other, for they each depend upon the establishment of the identical contract. * * * When a certain state of facts under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, *though they may not be able to 'stand together'; the enforcement of the one remedy being a satisfaction of the party's claim.* In such case the *invocation* of the one remedy is not an election which will bar the other, *unless the suit upon the remedy first invoked shall reach the stage of final adjudication,* or unless by the invocation of the remedy first sought to be enforced, the plaintiff shall have gained an advantage thereby, or caused detriment or change of situation to the other. * * * The suit for specific performance, therefore, not being the invocation of an inconsistent remedy, *and being discontinued before final judgment,* would not of itself constitute such an election as barred the later suit for damages. * * * The invocation of a consistent remedy is not a bar to the prosecution of

the other unless the action has proceeded to final judgment. * * *" (Emphasis ours.)

In *Connihan* v. *Thompson,* 111 Mass. 270, the court said:

"The remedy in equity, by compelling specific performance, and that at law in damages for the breach are both in affirmance of the contract. They are alternative remedies, but not inconsistent; a remedy in both forms might be sought in one and the same action. If the plaintiff institutes separate actions he cannot carry both to judgment in satisfaction. He may be compelled by order of the court, in any stage of the proceedings, to elect which he will further prosecute * * *. But the mere commencement or pendency of one will not bar the other, or defeat the action." (See also note in 26 A. L. R. 111.)

The Oklahoma court in *Stafford* v. *McDougal,* 43 P. (2d) 520, at 524, said:

"The rule is well established that a party may not affirm a contract and sue for breach, and at the same time disaffirm and rescind, and recover the consideration paid. After having once definitely elected his remedy, he is bound thereby and will not be allowed to speculate on the verdict, and, if unsuccessful, repudiate his election. Any decisive act of the party, with knowledge of his rights and of the facts, indicating intent to pursue one remedy rather than the other, determines his election."

In *Essington* v. *Parish,* 164 F. (2d) 725, a case decided in 1947 by the Circuit Court of Appeals for the 7th Circuit, the court said on page 730:

"Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts, where the party has but one cause of action, one right infringed, one wrong to be redressed.

28 C. J. S., Election of Remedies, Sec. 3. And where a person has two or more remedies for the redress of a wrong or the enforcement of a right and these remedies are based upon inconsistent theories such person is put to an election, and when he has with full knowledge of the facts, definitely chosen to pursue one remedy he will be bound by his election, *Glezos* v. *Glezos,* 346 Ill. 96, 99, 178 N. E. 379. If he has voluntarily chosen and carried into effect an appropriate remedy with knowledge of the facts and his rights, he will not, in general, be allowed to resort afterward to an inconsistent remedy, which would involve a contradiction of the grounds upon which he before proceeded. 18 Am. Jur., p. 130."

In *Axelrod* v. *Osage Oil & Refining Co.,* 29 F. (2d) 712, a case which arose in Oklahoma, the court said:

"It is said in 21 C. J. 1223, Sec. 227: 'A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.' * * *" (Citing cases.)

The court went on to say, on page 729:

"The doctrine of election of remedies, while not a favorite of equity, and referred to in one case in the Supreme Court as a harsh remedy, and one not to be extended, has been so long recognized, that as said by the Supreme Court in *Friederichsen* v. *Renard,* 247 U. S. 207, 211, 38 S. Ct. 450, 451 (62 L. ed. 1075), 'It is a long observed and deeply intrenched rule of procedure'."

Bearing on the question of the application of state law to a case of this type brought in the Federal Court, the court in *Parks-Cramer Co.* v. *Mathews Cotton Mills,* 36 F. Supp 236, said:

"Upon the hearing, it was conceded that the three

written contracts were consummated in North Carolina and should be interpreted according to the law of that state. (Citing cases.) Hence the above motion is to be determined according to the substantive law of North Carolina; and that law is to the effect that a purchaser cannot treat a contract as valid for the purpose of recovering damages thereon, and at the same time recover damages for fraudulent inducement of the contract. (Citing cases.)"

In *Pacific Mutual Life Ins. Co. of Calif.* v. *Rhame,* 32 F. Supp. 59, the court said:

"* * * an action for the fraudulent breach of a policy contract is different from and alternative to an action for the enforcement of the terms and conditions of the policy. It requires no extended discussion to conclude that an action for fraudulent breach not only does not regard the contract as continuing in force, but necessarily treats it as at an end, and is the exercise of one of the alternatives pointed out in *Shuler* v. *Equitable Life Assurance Society,* 184 S. C. 485, 490, 193 S. E. 46, 48. To treat the contract as at an end for the purpose of recovering damages for its breach, and thereafter to seek to have it treated as in force, is to occupy positions not only inconsistent, but repugnant to each other. * * * It is axiomatic that parties should not try their cases piecemeal, and if the pursuit of the remedy adopted by Rhame was not fully compensatory for the breach of the policy contract, he is nonetheless bound by his choice of remedy."

In *Holden* v. *American News Co.,* 52 F. Supp. 24 (1943), the court said:

"Under Federal Rules of Civil Procedure, Rule 8 (e) (2), 28 U. S. C. A., following Sec. 723c, 'A party may also state as many separate claims or defenses as he has, regardless of consistency * * *.' *The giving of full recognition to that rule does not permit a de-*

fendant to avoid taking a stand during the proceedings as regards utterly irreconcilable defenses." (Emphasis ours.)

The following cases simply hold that one may not be required to elect *before trial* on which of several alternative claims or defenses he will rely: *Reconstruction Finance Corp.* v. *Goldberg,* 143 F. (2d) 752; *Fidelity & Deposit Co. of Md.* v. *Krout,* 146 F. (2d) 531; *Kraus* v. *General Motors Corp.,* 27 F. Supp. 537; *Dollar* v. *Land,* 154 F. (2d) 307, 310; *Empresa Agricola Chicama Ltda.* v. *Amtorg Trading Corp.,* 57 F. Supp. 649.

In *Vann-Severn Machine Co.* v. *John Kiss Sons,* 2 F. R. D. 4, it was held: "In answering this objection the court holds that the defendant *will* be required to make its election, but it can do so during trial."

The following cases also deal with the question of election of remedies in the Federal courts: *Schultz* v. *Manufacturers & Traders Trust Co.,* 40 F. Supp. 675; *Mayfield* v. *First Nat'l Bank of Chattanooga, Tenn.,* 137 F. (2d) 1013; *Sylvania Industrial Corp.* v. *Lilienfeld's Estate,* 132 F. (2d) 887; *Dellefield* v. *Blockdell Realty Co.,* 128 F. (2d) 85; *General Electric Co.* v. *Hygrade Sylvania Corp.,* 61 F. Supp. 476; *Viles* v. *Prudential Ins. Co. of America,* (C. C. A. 10) 124 F. (2d) 78, certiorari denied, 86 L. ed. 1214, 315 U. S. 816, rehearing denied 86 L. ed. 1775, 316 U. S. 708.

QUERY: If this case shall be returned to the trial court for further hearing, what are the issues to be submitted? Do we again face all three issues? Can the plaintiff still continue to assert that it is entitled to the recovery of premiums due? Or, are we to try only that issue covered by the

Circuit Court's findings in this case, that is to say, the issue concerned in the second cause of action?

In other words, does the power to present inconsistent causes of action continue after the decision of the Circuit Court, or through the decisions of the Supreme Court, or through subsequent trials? The very presentation of the question indicates that there must be some period at which the necessity arises for one issue and one only to be tried. We think it arises at the close of the plaintiff's evidence or at the close of all of the evidence in the case, and we cannot conceive that this Court will permit a continued inconsistent position throughout all the possible appeals which may arise in this action.

For instance, as we view the opinion of the Circuit Court in this case, it will be necessary upon the trial of the second cause of action for the court to interrogate the jury as to whether or not the defendant had knowledge of re-insurance, so that the proximate cause of the failure to insure was the defendant's fraud. Unquestionably the jury will hold that there was no such knowledge, and hence the second cause of action will go out. Or, if the court holds that there is no evidence to justify its submission, the second cause of action will go out. Then the plaintiff appeals again. Or the defendant appeals. This might go on *ad infinitum*. Is it conceivable that during all that period of time the plaintiff could still stand on all three of its causes of action?

Conclusion.

For the reasons above stated, petitioners pray that the writ should be granted and the judgment below reversed.

Respectfully submitted,

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